

INTERNATIONAL LAW WEEKEND 2013 KEYNOTE ADDRESS: THE ADVOCATE IN THE TRANSNATIONAL JUSTICE SYSTEM

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I am very grateful for the opportunity to address this audience at International Law Weekend 2013. I have practiced in New York now for more than twenty-five years, and I've watched this weekend grow into what Ruth Wedgwood has just fairly described as a landmark on the international law calendar. So thanks to Ruth,¹ and to David Stewart,² and to John Noyes,³ and to all their ABILA⁴ colleagues for inviting me, and to Fordham Law School and the Leitner Center for so generously hosting this whole event.

It's a special treat for the President of the American Society of International Law to be making this address this year, because as Ruth has mentioned, ASIL⁵ will be collaborating this coming spring with the

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4 American Branch of the International Law Association.

5 American Society of International Law.

American Branch of the International Law Association to host a joint meeting, which promises to gather some 2000 international lawyers from around the world. ASIL and the ILA⁶ are structurally different, but they are very much likeminded organizations. Each of us is in the business of developing, debating, and disseminating international law with the objective of strengthening the rule of law on the international plane. I should add, too, that even though we are the American Society, close to half our membership are non-U.S. nationals, and we very much aim at our annual meetings to provide an international forum. So we look forward to collaborating with the ILA and its American Branch this spring, and you all should plan to be there.

But I turn back to this meeting, and its focus on the internationalization of law and legal practice. Just glancing at the program, it's clear that you have before you an intellectual treat, in the form of an extraordinary range of projects and a truly impressive roster of speakers. But I start this talk with a glance at the program for an additional reason, as it confirms the conference theme by so pointedly illustrating the ferocious expansion of subject matter governed or touched by international law. You have programs on family law, Internet law, human trafficking not as a matter of domestic crime but as a human rights issue, and a whole range of other topics. The program also demonstrates how deeply international law has penetrated domestic legal systems, to a degree that would surely surprise the visionaries from a century or more ago who founded ASIL and the ILA. Finally, the program makes a parallel point by showing the expansion of conduct, by both state and private actors, that is subject to independent examination in the form of international adjudication and arbitration. You have panels on international discovery and U.S. litigation, standards of review in investor-state arbitration, the referral mechanism of the international criminal tribunals, the Inter-American human rights system, head-of-state prosecutions at the ICC,⁷ and organizing arbitral proceedings. That's quite a range.

As I reflected on how I might address the conference theme today, I realized that, if you'll allow me to say so, that theme—the internationalization of law and legal practice—closely reflected my own career. Let me explain.

I went to law school thinking I was going to be a litigator, hopefully starting as a prosecutor at the U.S. Attorney's Office downtown. But I also had a real interest in international matters. So I faced a seeming dilemma—since litigation is jurisdiction-specific, how can I be a litigator and still do

6. International Law Association.

7. International Criminal Court.

international work? Then, after having the great privilege of working for Justice Blackmun, who himself had great respect for the international system, I went to work for Judge Howard M. Holtzmann at the Iran-United States Claims Tribunal in The Hague. There I was introduced to the universe of international dispute resolution, though, as I will explain, it was not nearly as expansive a universe as it is today. So I came back to New York looking for a firm that had a discrete international dimension to its litigation practice, and a strong commitment to pro bono work as well.

My plan was to develop an international disputes practice that encompassed commercial work, public international law work, and human rights work. Actually, though I'm calling it a plan and making it sound quite specific, it would probably be more accurate to describe it as an instinct, a strong one, but not very specific. In my defense, I should note that this was twenty-five years ago, and there were few models for this kind of practice around. But whether by plan or by instinct, my practice has developed in a way that mirrors the theme you all have been discussing this weekend. So at the behest of Ruth and David, and with your indulgence, I will address the conference theme by combining in my remarks both professional observations and personal reflections.

That necessarily means that I will be looking at the theme through the lens of international adjudication and arbitration. Of course, I don't mean to suggest that the internationalization of law and legal practice is only evident in that field, or that that's the only lens through which one might examine the phenomenon. As I emphasized at the outset, far from it. But it's the means by which I will find it easiest to describe the contemporary practice of international law.

I want to do this in five steps. First, I'll consider in turn 1) interstate adjudication; 2) the emerging transnational justice system of international arbitration; 3) the governance regime reflected in investor-state arbitration; and 4) the adjudication of international cases in national courts. I'll then consider 5) an especially compelling example of the intersection of the international and national planes. I recognize that this will not be a comprehensive tour even of the universe of international adjudication and arbitration. For example, I am not going to talk about the international trade regime and I will refer if at all only fleetingly to the international human rights system. But I think the areas I will address will suffice to make the point. Then I will conclude—be careful—with a few points of advice and encouragement.

I begin with the traditional model of international adjudication, that of interstate adjudicatory bodies. These bodies have one feature in common: They derive their jurisdiction from the consent of states. They are generally

created by treaty, and as a consequence they exist and operate within the confines agreed to by states.

Though we have had examples in earlier times of arbitral commissions, such as those established by the Treaty of Paris, and of *ad hoc* tribunals, such as that established in the much-heralded *Alabama* arbitration, the first permanent body of this kind was the Permanent Court of Arbitration established by the First Hague Peace Conference in 1899. The international lawyers of the time who drove that vision were navigating uncharted territory. Never before had a permanent international court existed, and many thought that the enterprise was quixotic and bound to fail.

Those critics were wrong, as we know. Not only did the Permanent Court of International Justice and the International Court of Justice follow, but the soon-to-be-published Oxford Handbook on International Courts will count at least twenty-five permanent international courts and tribunals in existence. And these courts and tribunals have not only increased dramatically in number, but considered cumulatively, they have also acquired jurisdiction over an increasingly broad scope of subject matter and ever more diverse actors, including individuals.

Some years ago it seemed the intellectual vogue to talk about the fragmentation of international law, and many people thought of that as an unhelpful development brought about by the proliferation of international courts. But if you think of it from a different perspective, that is, as I said a moment ago, as an increase in the quantum of conduct that is subject to independent and impartial adjudication, it may appear differently. We might, indeed, begin to think of this set of international courts as an international judicial system.

I want to make two quick points in that vein. First, I want to focus on the term “judicial,” in order to ask whether we are looking at judicial institutions. I’m going to use the example of provisional measures before the ICJ.⁸ It was long the majority view that provisional measures indicated by the ICJ under Article 41 of the ICJ Statute were not binding. In the *Case on the Vienna Convention on Consular Relations*, though, after the United States failed to abide by an order of provisional measures requiring that it take all steps necessary to halt the execution of a Paraguayan national by the Commonwealth of Virginia, we made the argument on behalf of Paraguay that the order was indeed binding and that, as a consequence, the United States had breached an international obligation by failing to comply. That case did not go forward, but that same set of facts repeated themselves in the *LaGrand Case*, and there the Court held that provisional measures

8. International Court of Justice.

were binding. The question we had tried to put to the Court was straightforward—was the Court a court? The Court's reasoning was equally straightforward, and I think it fair to say that it reduced to the proposition that if the Court were to fulfill its function as a "judicial" organ, it must have the authority to issue binding orders intended to preserve its capacity to decide the dispute. That ruling, in turn, had considerable influence over other international tribunals deciding, or reconsidering, the binding character of their own provisional measures orders.

Second, I want to focus on the term "system," in order to ask whether we are dealing with an integrated justice system. The influence on one another of the various international courts and tribunals that considered the binding character of provisional measures would suggest that there was some form of system at work. We might confirm that sense by considering the further development by those international courts and tribunals that have recognized the binding character of provisional measures of the criteria for their issuance. Once these courts and tribunals decided that provisional measures were binding, they needed to decide the considerations by which an application would be evaluated. There has ensued a rich dialogue, in particular between the ICJ and investor-state tribunals constituted under the ICSID⁹ Convention and Rules and other regimes. Must the court or tribunal consider the applicant's prospects of success, and at what threshold? What constitutes irreparable harm? Does the objective to avoid exacerbating the dispute constitute an independent ground on which provisional measures might be granted? The ICJ continues to work through these issues, and, frequently referring to but not always following ICJ jurisprudence, so do investor-state tribunals.

Indeed, as they consider awards rendered under other treaties on similar issues, investor-state tribunals constituted on an *ad hoc* basis to hear a single specific dispute now consider the very question of their relationship with other tribunals in this radically horizontal structure. Given that structure, is each tribunal a completely independent decision-maker, or should it take into account other decisions in order to provide predictability by developing a *jurisprudence constante* on recurring questions? In effect, these tribunals are debating to what extent the investor-state arbitration system is, in the end, an integrated system.

The second component of this international legal order that I want to mention is what I would consider the emerging transnational justice system represented by international commercial arbitration. What do I mean by transnational? There are three distinguishing features. First, the system involves the delegation of dispute resolution authority to decision-makers

9. International Centre for Settlement of Investment Disputes.

who are not directly appointed, regulated, or supervised by any individual state or group of states. To me, this is truly striking, as one of the core functions of the modern state is to provide for the impartial adjudication of civil disputes, and then to bring its coercive authority to bear in order to give effect to the resolution of the dispute. In international arbitration, that authority is delegated to a decision-maker operating outside the direct authority of any State.

The second feature of this transnational justice system is the application of a diverse body of national and international law to both substance and procedure. As to substance, it means that there is no such thing as foreign law in international arbitration. As to procedure, there has developed both a common set of expectations about the conduct of international arbitrations and the recognition of the tribunal's discretion to diverge from that common set of expectations to meet the particular needs of a given case.

The third feature I highlight is the willingness of national judicial authorities to enforce the decisions of entities that operate not only outside of their own jurisdiction, but outside the jurisdiction of any state. Due to the almost universal ratification of the New York Convention, most national courts are required to enforce foreign awards subject only to very limited review—essentially to ensure the basic integrity of the process that led to the award.

What does that mean for the practitioner? It means that we can develop a litigation practice that literally spans the globe. For example, I have tried cases in Moscow, Hong Kong, Rio, São Paulo, Zürich, Paris, London, San Francisco, Washington, and New York. It means also that you have the chance to work with and against truly talented lawyers from literally around the globe. Just a few weeks ago, before the parties settled the case on the Friday before a Monday start, we were about to try a case in São Paulo in which we had French, Brazilian, and New York lawyers on both sides, and a tribunal consisting of arbitrators from Belgium, Germany, and Switzerland. And these cases go forward, as I said before, under a wide variety of governing laws and pursuant to a wide variety of procedures.

The third area I'd like to address is investor-state arbitration. It has frequently been remarked that one of the great developments of international law in the second half of the twentieth century has been the expansion of its subjects, and perhaps the two most important components of that development are, first, greater protection of fundamental human rights and the development of the notion that international law regulates to an important extent the relationship between nationals and their own state, and, second, the recognition that individuals and business entities may contract with and resolve disputes against states on the international plane.

That latter phenomenon is manifested in the arbitration provisions of many bilateral investment treaties.

You will know of the basic investor-state regime. Over the last several decades, but at an accelerating pace more recently, there has been a proliferation of bilateral and multilateral investment treaties with two important features. First of all, these treaties provide substantive protections to nationals of one state investing in the other. But for my purposes, even more importantly, they provide in most cases for the right of an investor to bring arbitration proceedings to remedy breaches of the substantive standards. In effect, one state makes an open-ended offer to nationals of the other state as defined in the treaty to bring claims in their own name against the host state for alleged violations of the treaty protections. That, you will appreciate, is an extremely important move away from the traditional model of diplomatic protection. And it is reinforced by the obligation of other states, under either the New York Convention or the ICSID Convention, to give effect to foreign arbitral awards by reducing them to a national judgment.

To use a simple example from my own practice, some years ago we represented a cement manufacturer whose plant in a Latin American state had been expropriated. Had there been no applicable bilateral investment treaty, the investor would have had to face the frequently insuperable obstacles of suing the expropriating state in a national court. Instead, it brought proceedings under the BIT¹⁰ and reached a settlement that would almost certainly not have been possible absent the threat of the arbitration proceedings. In a different case in which I sat as arbitrator, the tribunal heard claims that actions by national prosecutors had breached the obligation of fair and equitable treatment accorded the investor by the bilateral investment treaty.

I turn finally to national courts. During the span of my own career, there has been a dramatic increase in both the number and type of international disputes submitted to national courts for resolution. National courts now routinely interpret and apply treaties, including human rights treaties and treaties governing more mundane matters, such as the Warsaw Convention. Similarly, national courts regularly interpret and apply foreign law, including in the interpretation of contracts, and more generally, resolve commercial disputes between entities and individuals from different jurisdictions.

National courts are also increasingly asked to adjudicate state conduct, particularly in light of the widespread acceptance of the restrictive view of sovereign immunity. Again, I'll give you a few examples from my own

10. Bilateral Investment Treaty.

practice. I have done cases in which I have enforced the treaty rights of international organizations within the U.S. legal system. I have litigated sovereign immunity issues in the United States courts both in human rights cases and in commercial cases, and I have also litigated the question of what state should take cognizance of the dispute.

For example, I recently argued before the Third Circuit in a case involving the alleged violation by a foreign insurance commissioner of an anti-suit injunction issued by a U.S. federal court. The case arose when the commissioner sought to enforce in the Cayman Islands a judgment rendered in his own state. So, in effect, there was a three-way contest, and each of those courts had to decide the extent to which where they were prepared to assert their jurisdiction.

For another example, some years ago, we brought an action in federal court against Ethiopia on behalf of a class of Eritreans whom Ethiopia had deported during the Eritrean-Ethiopian War. We first went to the D.C. Circuit on the question of whether diplomatic protection by Eritrea in the form of claims brought before the Eritrea-Ethiopia Claims Commission in the exercise of diplomatic protection constituted an adequate forum for purposes of the *forum non conveniens* doctrine. We won on that score. We then went back to the D.C. Circuit on the question of whether the necessary contacts existed to confer subject matter jurisdiction under the FSIA.¹¹ On a fairly technical question, we did not prevail. But, again, the case serves as an example both of litigation against foreign states in national court and of courts trying to decide where such a case may be decided.

For another example, reverting to the transnational justice system I just mentioned, U.S. courts, like other national courts are regularly asked to determine whether to give effect to foreign arbitral awards. In a recent case I argued in the Second Circuit, a Brazilian party was seeking to enforce an arbitral award rendered in São Paulo. The losing party argued that it had never agreed to arbitrate the dispute. We persuaded the Second Circuit that the district court had erred by failing to give effect to the arbitral tribunal's determination that the dispute was within the scope of the arbitration clause and hence that the tribunal had jurisdiction. The Court sent it back to the district court to determine whether the parties had formed an arbitration agreement in the first place, and proceedings are now pending there.

In a final example, we represented a foreign government in a case in federal court in D.C. in which an adverse party sought to enforce an award. We argued that the arbitral tribunal's authority had been properly revoked under the law applicable to the proceedings, that of the juridical seat. The district court agreed, effectively, that if the arbitrators' authority had been

11. Foreign Sovereign Immunities Act.

validly revoked the arbitration could not have gone forward and the award could not be enforced. So here's another instance of a national court having to decide whether to give effect to a foreign arbitral award.

So, before getting to the advice part, I want to talk about a set of recent cases in which there was an especially dramatic intersection of the international and national planes, which allows us to look closely at the evolving international legal order. In the *Avena* case between Mexico and the United States, the International Court of Justice held that the United States had violated its obligations under the Vienna Convention on Consular Relations in the case of fifty-two Mexican nationals on death row in various states of the United States.¹² To reach that decision, the ICJ had to decide to what extent obligations under the treaty reached into the criminal justice system of States party to the Convention, in the face of arguments by the United States that the Court should not insert itself into the dispute because, if it did, it would effectively be acting as a court of criminal appeal.¹³ The Court held that there had been violations in fifty-one of those cases, and provided as a remedy that the United States provide review and consideration of those convictions and sentences within its own legal system.¹⁴

By Article 94(1) of the United Nations Charter, the United States had undertaken to comply with the judgment of the ICJ in any case to which it was a party. President Bush, citing the paramount importance of complying with that obligation for purposes of maintaining the credibility of the United States in international affairs and the safety of U.S. nationals living, working, and traveling abroad, issued a memorandum in which he ordered state courts to take jurisdiction of claims for review and reconsideration by any of the fifty-one nationals.

In the *Medellín* case, one of the Mexican nationals subject to the *Avena* judgment sought to enforce that judgment, and as a consequence the U.S. Supreme Court considered the constitutional issues arising from his request.¹⁵ In that case, Medellín argued that pursuant to the Supremacy Clause, which made treaties, like statutes, the supreme law of the land, U.S. courts had to enforce the judgment by virtue of Article 94(1) without any further action by the President or Congress.¹⁶ The President argued that the U.S. courts did not have the constitutional authority to decide whether to

12. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 128 (Mar. 31).

13. *Id.*

14. *Id.*

15. *Medellín v. Texas*, 552 U.S. 491 (2010).

16. *Id.* at 504.

enforce the judgment, but rather that that authority was entrusted to him by virtue of his Article II foreign affairs power, and he asked the Court to give effect to his determination that the United States would comply.¹⁷ Texas argued that neither the Supremacy Clause nor the President's determination was sufficient, but that Congress had to legislate compliance.¹⁸ Nobody questioned that the United States had an obligation to comply under international law; the only issue was whether and how that obligation was enforceable as a matter of U.S. law.

In the *Medellin* decision, the Supreme Court held that the Article 94(1) obligation did not have the status of domestic law and that hence neither the Court acting directly under the Supremacy Clause nor the President acting pursuant to Article II could give that obligation effect.¹⁹ In its view, because the Article 94(1) obligation was not "self-executing," only Congress could act to comply.²⁰ Specifically, rather than assuming that the President and the Senate, the constitutionally authorized treaty-makers, would have intended the United States to comply absent contrary congressional direction under the later-in-time rule, the Court reasoned that Article 94(1) should be interpreted to preserve what it described as the "option of noncompliance."²¹

As Ruth mentioned in her introduction, I argued for Mexico in the ICJ in *Avena* and for the petitioner in *Medellin*, so it will come as no surprise that I disagree with the conclusion. But I am not, I am quick to assure you, going to subject you this afternoon to my critique of that decision. I want instead to make a simple point about our subject today.

In *Avena*, by fashioning the remedy that it did, I think it fair to understand that the ICJ effectively invited the Supreme Court to partner with it in the enforcement of international law. This time, the Supreme Court declined that invitation. I maintain the hope that on some future occasion, in some other case, a different result will ensue. But just the fact that the situation arose in which the highest judicial organ of the United Nations and the U.S. Supreme Court both had to consider these fundamental questions and had to consider, in effect, the boundary between each other's authority illustrates in the brightest colors possible the internationalization of law and legal practice that is this conference's theme.

17. *Id.* at 523–24.

18. *Id.* at 504.

19. *Id.* at 498–99.

20. *Medellin*, 552 U.S. at 525–26.

21. *Id.* at 511.

So, what does this all mean for all of you? Here, I direct my comments to the students and young lawyers at the conference. I have tried today to speak of four discrete spheres of international adjudication—the interstate, the transnational, the investor-state, and the national—and to try at the same time to suggest the coalescence to some degree of these spheres into a greater international legal order. This system is dynamic, and it has boundaries that are hard to define. Surely, for example, the traditional dichotomy between public international and private international law provides little help in understanding the international legal order as it exists today. For these reasons, this system will be subject to your influence as the international lawyers of today and tomorrow.

As you consider what role you might play in that international legal order, I want to give you three pieces of advice and three points of encouragement. First, if you want to be an international lawyer, a practicing international lawyer, there are some basic skill sets that you will need to have. I've suggested that this is a very wide legal order that touches on a lot of different areas. So it will be very important to be well versed not just in general public international law, not just in basic tools of treaty interpretation and the like, but also in fields such as comparative law, in commercial law, and in human rights law. In but one example, one of the debates happening at the moment in the investor-state community is the extent to which human rights law should have an impact on investment treaty interpretation and hence investor-state arbitration. To be an effective international lawyer, you need to have broad training in international law but also a grounding in national law and their intersection.

Secondly, no matter what form of practice you might take, whether you're going to be an advocate, a private advisor, an international transactional lawyer, a regulator, or a policy-maker, whether you're going to work at a law firm, a private company, an NGO,²² an international organization, a foreign ministry, or another government body, you should have a sound grounding in international economics and corporate finance. This suggestion sometimes comes as a great shock to young lawyers thinking that they're going to practice international law. But governments are economic actors as well as regulators, and private companies generate enormous impact precisely because of their economic activity, and if one wishes to be effective in addressing that activity, whatever the context, one should have the relevant expertise.

And finally, if you want to be an advocate, it's extremely important that you have a wide range of advocacy skills. That is, if you're going to be an international practitioner, you really should be prepared to stand up in a

22. Non-Governmental Organization.

national court one week, before an international arbitration tribunal composed of three common lawyers or civil lawyers or a mix of both the next, and in an international court or tribunal after that. What does that mean? That means you should be well trained in your own advocacy culture. We all come from some place and we all have to get our first set of skills. But we must also be prepared to adjust to new advocacy cultures so that you can operate in a wide variety of fora.

I will give you an example from international arbitration. As international arbitration has become more and more international, that is as more and more nationals from the jurisdictions that it actually affects become practitioners, and administrators, and arbitrators, we see the phenomenon, wonderful to watch, of young lawyers from Brazil, and India, and Japan, and other jurisdictions, many of whose advocacy cultures may not use cross-examination, become skilled cross-examiners. Why? Because the general set of expectations in most international arbitrations these days is that there will be witness testimony and that it will be subject to cross-examination. And so you have young lawyers who, in order to succeed in this transnational system, have developed skills that they wouldn't have necessarily developed in their original advocacy culture. So as I say, it is well and good to be grounded in your own advocacy culture, but you've got to be prepared to operate in a variety of systems.

I want to finish, if I may, with three points of encouragement. The bottom line is that you are incredibly lucky to be at this point in your career. As I said at the outset of these remarks, I started with a strong instinct about what I wanted to make happen, but I would never have been able to predict how things would actually play out. As Ruth will confirm, when you clerk at the U.S. Supreme Court, you always watch the arguments with the hope that you will have the chance to stand there some time. But when I lived in The Hague, and passed the Peace Palace virtually every day on my way to the Tribunal, I never wondered whether I would have the chance to argue there, before the ICJ or any of the other international tribunals that occasional conduct proceedings there. Yet because of the developments of which I've spoken today, I've argued several times more in the Peace Palace than in the U.S. Supreme Court. You are sitting here now knowing that this international legal order, this universe, is expanding. That's for sure. But you don't know how it's going to expand, and you don't know yet what you'll be doing twenty-five years from now. I'm going to suggest that there are three things that make it well worthwhile plunging ahead.

First of all, it's enormous fun. If you are an international legal practitioner, you get to work with smart, dedicated, principled lawyers from all over the world. As much as I am a sentimental U.S. patriot, I love the opportunity to work all the time with people from all over the world. They

will often have different backgrounds, different assumptions, different legal training, different politics. It all makes for a great challenge, and a truly rich intellectual exchange.

Second, and I say this recognizing that it may be that everybody thinks this about their own practice, but in this area of international law and international dispute resolution, theory and practice are very closely intertwined, and we are constantly dealing with legal issues where the public policy driving the issue is at the surface or right beneath it. Many of the legal issues I've just talked about, in public international law, in investor-state arbitration, in commercial arbitration, in national law like the FSIA, will be driven by important policy considerations. If you are prepared to test the theory against the practice and then have the practice test the theory, you will understand both dimensions much more fully.

And finally, I would hope that wherever you go and whatever practice area you take, you think of international law as an important component of the rule of law. At the end of the day, we're all in this business because we believe that the rule of law has the capacity to contribute to social and economic development, to protect people from physical and economic insecurity, and, at the risk of sounding grandiose, to promote the dignity of the human person.

That's why we're lawyers; that's why we think of ourselves as part of a noble profession. I hope that you remember that you are all members of an increasingly visible, an increasingly influential, and an increasingly global college of international lawyers, and that in that capacity you will pursue the goal of a just world under law.

Thanks very much.